BOOK REVIEWS

INTRODUCTION TO AUSTIN'S THEORY OF POSITIVE LAW AND SOVEREIGNTY, by R. A. Eastwood. (London: Sweet & Maxwell, 1916, pp. vi, 72.)

Those who begin the study of the science of jurisprudence generally do so with the work of John Austin, and, knowing nothing of the theories of other writers, accept more or less unreservedly the great positive jurist's masterful conclusions. With extended knowledge, students find that Austin's views are by no means unanimously held, and ofttimes come to a complete change in their own opinions, not even accepting those of Austin's doctrines which really are valid, and arriving at final conclusions only with difficulty because it was not realized at the outset that Austin's arguments must be slightly modified to be acceptable, and that much of the criticism of this writer is mere abuse.

Similar difficulties on the part of students are perhaps inevitable in any subject where there is as much controversy as in the field of jurisprudence and would doubtless be the same no matter what author was the first studied. But as a matter of fact, Austin is invariably the first, both in jurisprudence and in political science—so far as the study of sovereignty is concerned—and so it is a very admirable purpose which is served by Mr. Eastwood's little volume which attempts "to give a brief summary of the more essential portions of Austin's Theory of Positive Law and Sovereignty (for that is the part of his work which has caused most discussion), together with a summary of the various views and discussions which it has provoked." This design is fully realized so far as Austin's own theories are concerned; limitations of space prevent any full discussion of other legal theories, but what Mr. Eastwood has to say, while it falls short of being a "summary," does serve to indicate the chief criticisms to which Austin has been subjected, and to make it easier to extract the truth from his arguments.

The body of the book is divided into three chapters. The first, which is introductory, defines jurisprudence and shows its relation as a social science to politics, ethics, etc., and gives the main facts of Austin's life and work. The second chapter is concerned with "The Nature of Positive Law." Mr. Eastwood explains Austin's definition and classification of laws and modifies the definition until it comes to this: "Every positive law is a command of the State, obliging to a course of external conduct." A "sanction" is assuredly necessary, but this definition "must not be taken to mean that force is the only thing which induces men to obey the law. Motives of obedience vary greatly, even with the same individual," and Mr. Eastwood outlines Viscount Bryce's interesting and well-known classification of the motives of obedience: indolence, deference, sympathy, fear and reason. This is valid, but the ultimate backing of law is the command of the state; moreover, law is the product of slow but continuous development. Accept these two reconcilable principles, be aware of the ethical element in

jurisprudence which Austin completely overlooked and consider his definition as one of the whole, not of the part—as of all law, rather than particular laws—and you have his theories in a shape which will enable the student to read other severe critics, viz., Sir Henry Maine and Clark, and yet continue to accept much of Austin's reasoning.

In his *Lectures on Jurisprudence*, Austin first defined law in its widest sense as "a rule laid down for the guidance of an intelligent being by an intelligent being having power over him;" positive laws are those which are "set by a sovereign person, or a sovereign body of persons, to a member, or members, of the independent political society wherein that person or body is sovereign or supreme." Positive laws are the command of the sovereign and Austin then proceeded to a discussion of the sovereign after his treatment of law—a method which, although criticised severally by Sir Henry Maine, is logically defensible.

Mr. Eastwood gives a tolerable complete outline of Austin's theory, but his criticism is conditioned by his own knowledge of political philosophy which does not appear to be extensive. His chief point is that sovereignty is divisible—a principle the contrary of which has been generally accepted since Bodin. Nor does Mr. Eastwood make clear the most important modifications which must be put on Austin's theories: (1) that constitutional law really is law because it controls the government, not the state (as Austin seemed to consider) and is just as much an expression of the will of the state as are the enactments of a law-making body, for the state is not limited to a legislature as a mouth-piece; and (2) that the jurist is concerned only with those persons or bodies which have the power to express the will of the state —that sovereignty resides in the totality of these volitional organs, be they parliaments, courts, or assemblies—and that the sociologist or practical politician can determine the powers or influences, such as electorates, behind these organs. In short, there is a legal sovereign, with which the jurist is concerned, and a political sovereign, with which he has no concern. Recognize these two limitations on Austin's theories, and you get rid of his apparent inconsistencies. These can not be explained by arguing the divisibility of sovereignty.

As this review has already indicated, Mr. Eastwood's work will be of great value to the student of jurisprudence; but to the student of politics its worth is questionable. A bibliography gives the most important books dealing with Austin's legal theories—the author has relied largely on Jethro Brown's *The Austinian Theory of Law*—but the list of writings on sovereignty is very inadequate. The little summary of Austin's theories as to law, however, if read by every intending student of jurisprudence, would make subsequent study easier and discount the criticisms which Mr. Eastwood plainly shows not to be valid.

LINDSAY ROGERS.

THE LAW AND PRACTICE OF MUNICIPAL HOME RULE, by Howard Lee McBain. (New York: Columbia University Press, 1916, pp. xviii, 724.)

In twelve states of the Union certain or all cities may frame and adopt their charters. Under these many difficult questions have arisen